now. Ahmad did not say in his evidence that he was a partner. He merely said that the goods were sold to him. Lord Herschell in *The Owners of the Ship "Tasmania" and the Owners of the Freight* v. *Smith and Owners of ship "City of Corinth"*,[2] at page 225 said

"My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witness are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

According to section 193 of the Contracts (Malay States) Ordinance, 1950,

"A loan to a person engaged, or about to engage, in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such."

Here there was no evidence to show that he was a partner. I therefore find there is no merit in this ground of appeal.

I do not think that I should disturb the learned judge's finding as to damages as in his judgment, he had found "there is no dispute by the defendant as to the quantity, value or delivery of all these construction materials."

For the above reasons, I would dismiss the appeal with costs.

Thomson L.P. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Kam Woon Wah & Co.; Chooi Mun Sou.*

TAN CHIN KENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ismail Khan J.) June 19, 1964]

[Malacca — Criminal Appeal No. 1 of 1964]

Criminal Procedure — Charge — Attempted extortion — Framing of, in.

Penal Code, ss. 384, 385 and 511 — Attempted extortion — Charge — Framing of.

Penal Code, s. 34 — Act committed in pursuance of a common intention — Necessity for prosecution to specify reliance on section 34.

The appellant and another were charged "That you on 26.11.63 at about 11.30 a.m. at the Goh Lian Huat Coffee Shop, Bunga Raya Road, Malacca, in the State of Malacca did attempt to extort money a sum of $720.00 from one Wong Kak Sin by threatening to put the said Wong Kak Sin in fear of injury to wit, that you will smash up his shop if the said Wong Kak Sin did not pay up the demand and that you have thereby committed an offence punishable under section 385 of the Penal Code Cap. 45," and each convicted and sentenced to one year's imprisonment and six strokes of the rattan. On appeal against conviction and sentence it was contended that (i) the charge was bad for duplicity as it was not clear whether the appellant was charged with an offence of attempted extortion under section 384 of the Penal Code read with section 511 thereof or with an offence of putting a person in fear of injury under section 385, (ii) where the prosecution invokes the aid of section 34 it is necessary to frame a charge under that section.

Held: (1) though the charge was not happily framed, it was possible to make out what it alleged, namely, that the appellant and another put the complainant in fear of injury in order to the committing of extortion; there was therefore no question of the duplicity of the charge;

(2) there was nothing in the charge to indicate to the appellant with sufficient clarity that what the prosecution proposed to establish against him was not that he demanded any money from or threatened the complainant with injury but that he and others were acting together with a common intention to put the complainant in fear of injury with a view to committing the extortion and that in furtherance of the common intention of all of them the complainant was put in such fear.

Per Ismail Khan J.: "Where the charge is one of attempted extortion it should be framed under section 385 of the Penal Code and not under section 384 read with section 511."

Case referred to:—

(1) *Osman bin Abdullah* v. *Public Prosecutor* [1958] M.L.J. 12, 16.

CRIMINAL APPEAL.

H. B. Ball for the appellant.

Abdul Razak bin Dato' Abu Samah (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The appellant and one Tan Heng Hong (hereinafter called the 1st accused) were charged as follows:—

"That you on 26.11.63 at about 11.30 a.m. at the Goh Lian Huat Coffee Shop, Bunga Raya Road, Malacca in the State of Malacca did attempt to extort money a sum of $720.00 from one Wong Kak Sin by threatening to put the said Wong Kak Sin in fear of injury to wit, that you will smash up his shop if the said Wong Kak Sin did not pay up the demand and that you have thereby committed an offence punishable under section 385 of the Penal Code Cap. 45."

According to the prosecution, on 25th November, 1963, two young male Chinese, one of whom was the 1st accused, called on the complainant P.W.1 and his father P.W.2 at their shop No. 15, Bunga Raya, Malacca. They said they were members of a certain gang and asked him for $72 failing which they threatened to burn the shop. The complainant was frightened as a result of this threat. At about 6 p.m. the same day P.W.2 received a phone call instructing him to send the money to a coffee shop in Heeren Street. P.W.2 told the complainant about this and the latter then lodged a report. He went

to the coffee shop at Heeren Street at about 8 p.m. accompanied by some police officers, but did not meet anyone. The next morning the complainant received another phone call instructing him to bring the money to a coffee shop in Lorong Panjang at 8 p.m. The complainant again informed the police. A little later, the 1st accused and a young Chinese, other than the one who came with him on 25th November, called on the complainant to remind him about the money. This young Chinese was the appellant. They then left after which the complainant received another phone call requesting him to go to a coffee shop at Kampong Hulu immediately. He proceeded to this coffee shop where he met the appellant and the 1st accused and a few others presumably other members of the gang. One of these then demanded an increased sum of $720. The complainant then left. The appellant and the 1st accused followed him and pushed him into the Goh Lian Huat restaurant where they discussed the "question of money". Inspector Koh who was in the vicinity on receiving a signal from the complainant then arrived and arrested them.

Both the appellant and 1st accused denied that they had been to the complainant's shop or that they had ever seen the complainant or his father. They admitted being in the restaurant at the time of the arrest but denied that the complainant was there. In the event, the learned President convicted both the appellant and the 1st accused and sentenced each of them to one year's imprisonment and six strokes of the rattan.

The appellant appeals against both conviction and sentence.

The conviction was attacked on a number of grounds only two of which need concern me here. It was contended by Mr. Ball for the appellant that, in the first place, the charge was bad for duplicity as it was not clear whether the appellant was charged with an offence of attempted extortion under section 384 of the Penal Code read with section 511 thereof, or with an offence of putting a person in fear in order to commit extortion under section 385.

Section 383 of the Penal Code defines "extortion" as putting a person in fear of injury and thereby dishonestly inducing him to deliver property. Section 384 sets out the completed offence of extortion where the victim was put in fear and there was the inducement which induced the delivery of property. Section 385 reads as follows:—

"Whoever, in order to the committing of extortion puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Under this section, there is an offence called an inchoate offence to distinguish it from the consummated offence under section 384. The words of section 385 would therefore cover an attempt to commit extortion. This is clear from the note on this section in *Ratanlal,* 20th edition, page 992, which says:—

"The attempt to commit extortion has proceeded so far towards completion that a person has been put in fear of injury, or that there has been an attempt to excite such fear; but the offence is incomplete because there has been no delivery of property, etc."

In my opinion, a charge for attempted extortion is to be framed under this section (385) and not under section 384 read with section 511.

In this case, the charge is not happily framed but reading the words thereof it is possible to make out what it alleges, namely, that the appellant and the 1st accused put the complainant in fear of injury in order to the committing for extortion. A reference to section 385 makes this clear. There can therefore be no question of a duplicity of charge and this ground of appeal fails.

The appellant is on firmer ground in his other objection which in effect is that where the prosecution invokes the aid of section 34 for holding one person responsible for the result produced by the act of another, it is necessary to frame a charge under that section.

According to the evidence, the complainant met the appellant, the 1st accused and other members of the gang on the 26th at the coffee shop at Kampong Hulu. At this meeting it was one of the others still at large who demanded the sum of $720. The appellant was present along with the others and the inference is that he gave encouragement to them by his presence. The prosecution are therefore invoking the aid of section 34 of the Penal Code which reads:—

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

In the case of *Osman bin Abdullah* v. *Public Prosecutor,*[1] Thomson C.J. (as he then was) said:—

"We do not find it necessary to lay down any general rule as to whether, when the prosecution proposed to invoke the provision of section 34, it is necessary to specify that section of the Code in terms. On grounds of common fairness, however, where the prosecution are proposing to invoke the section the charge should make this clear to the accused."

There is nothing in the charge to indicate to the appellant with sufficient clarity that what the prosecution proposed to establish against him was not that he demanded any money from, or threatened the complainant with injury, but that he, the 1st accused and the others still at

large were acting together with a common intention to put the complainant in fear of injury with a view to committing extortion and that in furtherance of an intention common to all of them the complainant was put in such fear. For these reasons, I am satisfied that the charge offended against the principle set out in the above case. It is true that in that case the failure to frame the charge with specific reference to section 34 of the Penal Code was held to have occasioned no failure of justice. That case can be distinguished as it was tried in the High Court where the appellant was represented by counsel who had the advantage of studying the depositions in the case and where the evidence given by the prosecution witnesses did not differ materially from that given at the preliminary enquiry. As His Lordship observed, "it is clear that from the beginning in spite of the error of the charge, he (the accused) knew perfectly well what the case for the prosecution was going to be and what in fact it was."

These considerations, however, cannot apply to a trial in the Sessions Court. In the result the appellant succeeds on this ground of his appeal. His conviction is quashed and the sentence is set aside.

The 1st accused has not appealed. As my observations in respect of the appellant would also apply to him, in exercise of my powers of revision I quash his conviction and set aside his sentence.

Appeal allowed.

Solicitors: *Allen, Gledhill & Ball.*

FATIMAH v. WOK

[F.C. (Barakbah Ag. L.P., Ismail Khan, Azmi JJ.) June 24, 1964]

[Kota Bharu — Federal Court Civil Appeal No. 38 of 1964]

Land Laws — Land officer issuing possessory title to appellant — Legal title vested in respondent as owner — Order by judge to set aside possessory title — Whether proper — Kelantan Land Settlement Ordinance, 1955, ss. 3, 4, 5, 7, 8, 10.

This was appeal against the judgment of Hashim J. (*ante* p. 35) in which the learned judge held that the respondent was the lawful owner of lots 882 and 883 in the Mukim of Bechah Palas and directed that "the registration of the order made by the assistant district officer under section 8(1) of the Kelantan Land Settlement Ordinance be cancelled." The main ground of appeal was that the facts before the assistant district officer were apparently the same as that before the learned judge and that therefore the learned judge should have come to the same finding as the assistant district officer.

Held: under section 8 of the Kelantan Land Settlement Ordinance, the land officer has to make a finding of fact as to who was in possession of the land but under section 10 of the same Ordinance the judge has to go into the question of legal title. There was ample evidence in this case that the respondent was the legal owner of the land under the Land Enactment even though the appellant had the possessory title.

Observations on the Kelantan Land Settlement Ordinance, 1955.

FEDERAL COURT.

Hashim Abdul Hamid for the appellant.

H. L. Wrigglesworth for the respondent.

Azmi J. (delivering oral judgment): This is an appeal against the judgment of Hashim J. in which he held that the respondent in this appeal Wok binti Mat Diah alias Che Saamah is the lawful owner of lots 883 and 882 in the Mukim Bechah Palas and directed "that the registration of the order made by the assistant district officer under section 8(1) of the Kelantan Land Settlement Ordinance be cancelled."

The facts of the case might be summarized as follows: These two pieces of lands originally of one lot No. 456 were the subject matter of an enquiry by the assistant district officer under section 8(1) of the Kelantan Land Settlement Ordinance (hereinafter referred to as "the Ordinance"). After the enquiry the assistant district officer made an order that the appellant was in possession of the land. Against this order the respondent appealed to the district officer but her appeal was dismissed on 1st of May, 1960. She subsequently appealed to the High Court and the appeal was again dismissed by Hepworth J. on the 14th January, 1961.

On the 26th April, 1961 the respondent filed a suit under section 10 of the Ordinance claiming that she was the registered owner of the land. Before Hashim J. Wok binti Mat Diah the respondent stated that she was the legal owner of the land under the Kelantan Land Enactment. In support she produced two abstracts of title for the two pieces of land, one being dusun land and the other padi land. She planted padi and fruits and rubber on the land and after 5 years she allowed her son Jusoh to occupy the land and work it until the Land Settlement Scheme was introduced in Pasir Mas. Subsequently Jusoh allowed the appellant's father Awang Hamat who was then Penghulu of Kampong Bunut Susu to work on the land on the pawa system. In 1947 Wok charged the land to Penghulu Yunus and the charge was discharged in 1958. Incidentally this is confirmed by the two copies of abstracts of title she produced in court. She denied that she sold the land to the appellant's mother for $600 just before the outbreak of the last war. Jusoh bin Loman corroborated the story of his mother. Penghulu Yunus gave evidence of the charge to him and of the subsequent discharge. Yusoff bin Ismail (P.W.4) stated that his land is adjacent to this land in dispute. He also stated that in 1958 he saw Jusoh work on the land.